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EXAMINER

LARSON, JUSTIN MATTHEW

ART UNIT PAPER NUMBER

3727

DATE MAILED: 02/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

### Period for Reply

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2005.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.  
4a) Of the above claim(s) 18-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 December 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Applicant has elected with traverse the prosecution of claims 1-17. This application contains claims 18-20 drawn to an invention nonelected with traverse in Paper No. 20050825. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.
2. Applicant is reminded that the status of claims 18-20 should be clearly reflected in the claims, in compliance with 37 CFR 1.121(c). The claims should be indicated as (currently amended withdrawn), or something to that effect.
3. Applicant has requested reconsideration and withdrawal of the above-mentioned restriction. Applicant has asserted that the inventions are not "independent" and "distinct". Examiner maintains the position that the restriction is proper. As currently presented, claims 1-6 positively recite structural features of the disclosed child sling. Claims 7-17, offer a suggested use of the child sling. Such functional language does not impose any further structural limitations on the child sling, and therefore, claims 7-17 do not add any structural limitations beyond those already introduced in claims 1-6. Claims 18-20 positively recite a method of using the product that was structurally defined in claims 1-17.

Now, the inventions of claims 1-17 and 18-20 are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a

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materially different process of using that product. See MPEP § 806.05(h). In the instant case the product as claimed in claims 1-17 can be used in a materially different process of using that product. As stated in the previous Office Action, a user could first tie branches 14 and 16 together and then support the sling on a single shoulder, never utilizing the channel, the sling then hanging at their side as a traditional purse would. This process of using the sling is completely different than the process set forth in claims 18-20.

Applicant has asserted that the product structures called for by the claims result from the employment of the process steps and that the process claims are not for a process of use of the product, but rather for a process of making the product. Examiner reasons that the product is a child sling, and that the only structure required by the claims is a child sling made from an elongated piece of fabric having a channel of certain configuration and a pocket disposed thereon, as set forth in claims 1-6. The process steps of claims 18-20 describe how this sling is attached to a user's person. The process steps do not in any way produce the structure of the product and are not a process for making the product. In order for the process steps to be carried out, a user must have a fully assembled child sling as structurally defined in claims 1-6 in their possession. The child sling is made from some other process of manufacture, but not by the process of attaching the child sling to a user's person.

***Claim Rejections - 35 USC § 112***

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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5. Claims 1-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1-17, as currently presented, all recite the transitional phrase "consisting of". This phrase excludes any step, or ingredient not specified in the claim. *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948) ("consisting of" defined as "closing the claim to the inclusion of materials other than those recited except for impurities ordinarily associated there-with."). See MPEP § 2111.03. Examiner takes the position that each and every claim as currently presented contains essential features of the disclosed invention's structure, or necessary steps for using the invention as intended. Because no single claim contains all of the required structure or method steps, the claims must rely on one another to cover the full scope of the invention. The use of the phrase "consisting of" closes each claim and does not allow for proper dependency in the claims, rendering the metes and bounds of the claims unclear and indefinite.

Furthermore, in claims 7 and 15, the phrase "consisting of" is used, effectively closing the claims, however, the term "comprising" in each claim then attempts to re-open the claims. Because the claim is first closed, and then re-opened, the metes and bounds of the claim are indefinite.

#### ***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-6 and 15-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Hathaway (US 4,139,131).

Regarding claims 1-6, Hathaway discloses a child's sling having a channel (40) between its ends (Figure 7), wherein; the sling is an elongated piece of fabric (col. 2 line 15); the channel is near the middle of the sling (Figure 3); the channel extends over the entire width of, or cross-wise, the sling; and a pocket is formed (col. 4 line 20).

Regarding the pocket being used for holding child-care things, the initial statement of intended use and all other functional implications have been carefully considered but are deemed not to impose any patentably distinguishing structure over that disclosed by Hathaway which is capable of being used in the intended manner, i.e., child-care thing being stored in the pocket. There is no structure in Hathaway that would prohibit such functional intended use (see MPEP 2111).

Regarding claims 15-17, the initial statement of intended use and all other functional implications have been carefully considered but are deemed not to impose any patentably distinguishing structure over that disclosed by Hathaway which is capable of being used in the intended manner, i.e., being draped over a user's shoulder so that the channel rests on the shoulder, a first branch being passed across the front of the would-be carrier and around and up the back and through the channel, the other branch being passed around the back and to and across the front of the would-be carrier and up to and through the channel and tied in a knot with the first branch. There

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is no structure in Hathaway that would prohibit such functional intended use (see MPEP 2111).

***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 7-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hathaway in view of Cordisco (US 5,071,047).

Regarding claims 7-10, Hathaway discloses a child sling structurally equivalent to that of the claimed invention, but Hathaway does not teach the sling being worn on a carrier's back.

Cordisco, however, also discloses a child sling, and teaches that while the sling is mounted on the front of a carrier (Figure 11), the same sling can also be worn on the same carrier's back (Figure 12) without having to modify the structure of the sling. It would have been obvious to one having ordinary skill in the art at the time the invention was made to wear the child sling of Hathaway not only on their front side, but also their backside, as taught by Cordisco, in order to support the child in a different manner, perhaps more comfortable to the carrier.

Regarding claims 11 and 12, the knot of Hathaway is capable of being loosely tied or tightly tied, as any knot can be, effectively satisfying the limitations of the claim.

Regarding claims 13 and 14, Hathaway discloses a pocket (37) in a branch of the sling that would not be directly entangled in a knot formed therein, and is thus considered by Examiner to be beyond the knot, effectively satisfying the limitations of the claim. Regarding the pocket being used to hold child-care things, the initial statement of intended use and all other functional implications of the pocket have been carefully considered but are deemed not to impose any patentably distinguishing structure over the pocket disclosed by Hathaway which is capable of being used in the intended manner, i.e., to hold child-care things. There is no structure in Hathaway that would prohibit such functional intended use (see MPEP 2111).

#### ***Response to Amendment***

10. In view of Applicant's amendments, the drawings objection in the previous Office Action has been withdrawn.

11. In view of Applicant's amendments, the disclosure objection in the previous Office Action with regard to the embedded hyperlink has been withdrawn.

12. In view of Applicant's amendments, the rejections under 35 USC § 112 first and second paragraphs in the previous Office Action have been withdrawn.

#### ***Response to Arguments***

13. Applicant's arguments filed December 5<sup>th</sup>, 2005 have been fully considered but they are not persuasive.

14. Applicant has asserted that Hathaway's sling does not have a channel between its ends. Examiner would like to point out that Hathaway's loop 40 is between the ends of the sling, near the middle of the sling, and extends cross-wise of the sling, effectively



satisfying all the limitations currently required for the channel of the claimed invention. Hathaway's loop may not resemble the disclosed channel, but it certainly satisfies the structural limitations of the channel as currently defined in the claims.

15. Applicant has asserted that Hathaway's sling does not have a pocket. Hathaway specifically states that his sling has two pockets: (col. 4 line 20) and pocket 37. Either of these pockets is perfectly capable of carrying child-care items although Hathaway does not specifically state that the pockets are to be used for such purpose. There are no structural limitations in the claims as currently presented that would differentiate the pocket(s) of Hathaway from that of Applicant's claimed invention.

16. Applicant has attempted to use the phrase "consisting of" to limit the structure of the child sling. Applicant has asserted that this phrase limits the invention to a sling, the recited elements of the claim, and nothing more. Examiner takes the position that the specific structure of the "sling" has not been defined. Looking at claim 1, for example, the claim requires that the child's support is a sling having a channel between its ends, and that is all. Examiner points out that every structural feature of Hathaway minus the channel 40 can be considered the "sling". Looking at the reference in this way produces only a sling with a channel between its ends.

17. Applicant has asserted that it would be impractical to wear Hathaway's child sling on a user's back. Applicant's arguments with respect to this issue have been considered but are moot in view of the new ground(s) of rejection. Cordisco clearly shows that it is not impractical to dispose a child sling on either the front of a wearer or the back of a wearer.

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18. In response to applicant's argument that Hathaway was not designed by its maker to accomplish what Applicant claims or actually used, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. No structure of Hathaway must be removed or modified to function in Applicant's intended manner.

### ***Conclusion***


19. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

20. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Justin M. Larson whose telephone number is (571) 272-8649. The examiner can normally be reached on Monday - Friday, 8am - 4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan J. Newhouse can be reached on (571) 272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
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SUPERVISORY PATENT EXAMINER

JML  
2/15/06